Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIANE DREKSLER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S DUE PROCESS RIGHTS WERE CLEARLY VIOLATED WHEN FEDERAL GOVERNMENT AGENTS ENTRAPPED PETITIONER INTO COMMITTING A CLASS X DELIVERY OF QUAALUDES WHEN SHE WAS NOT PREDISPOSED TO DO SO, AND THEN SUBJECTED HER TO A HARSHER STATE COURT PROSECUTION?

II.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S RIGHT TO CONFRONT HER WITNESSES WAS VIOLATED WHEN THE TRIAL COURT DID NOT ALLOW HER TO CROSS-EXAMINE THE STATE'S STAR WITNESS ABOUT HIS OCCUPATION AS A MARIJUANA DEALER?

III.

SHOULD THIS PETITION BE GRANTED SINCE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN HER COUNSEL INJECTED ARGUMENT BEFORE THE JURY AND SOLICITED TESTIMONY FROM THE STATE'S KEY WITNESS REGARDING DREKSLER'S PREVIOUS MARIJUANA POSSESSION AND USE?

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Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

Petitioner, Diane Dreksler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, Second District.

OPINIONS BELOW

The unpublished opinion of the Illinois Appellate Court, Second District is *People of the State of Illinois v. Diane Dreksler* (No. 2-93-0444; June 20, 1994) and appears as Appendix A to this Petition.

JURISDICTION

On October 6, 1994, the Illinois Supreme Court denied Petitioner's request for leave to appeal from the adverse judgment of the Illinois Appellate Court. *See* Appendix B. This petition is filed within ninety days of that order and is thus timely.[1] This Honorable Court's jurisdiction is invoked under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [No] State shall deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> [The] accused shall enjoy . . . the right to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.

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[1] In an effort to be as accurate as possible regarding the due date of the present Petition, counsel requested the Clerk of this Honorable Court to compute the due date. Both the Clerk and counsel determined the due date to be January 6, 1995.

STATEMENT OF THE CASE

Petitioner Diane Dreksler is a forty (40) year old teacher and artist. (Tr. 929)[2] She received her bachelor's degree in education from Northeastern Illinois University and thereafter began her career as a substitute teacher in Chicago schools. (Tr. 929) Diane became a part-time art instructor at Maple School in Northbrook, Illinois, and soon earned a position as a full-time art teacher there. (C. 929) She has taught at Maple for the past seventeen (17) years, and recently became the head of their fine arts department. (Tr. 930) As a part-time artist, Ms. Dreksler specializes in sports illustrations, portrait work, and fabric sculptures. (Tr. 931) Before the present conviction, Diane had no prior criminal record.

Diane developed a colon/bowel condition which prohibited her from drinking alcohol, and she began using quaaludes as an alcohol substitute. (C. 316; Tr. 942, 957, 1091) On about ten occasions, Richard Hayes ("Ricky") and his wife gave Diane one or two quaaludes. (Tr. 957) Diane never purchased quaaludes from Richard Hayes, nor did she ever sell quaaludes. (Tr. 959)

Michael Grod was a friend of Diane Dreksler and her former husband for over twenty (20) years. (Tr. 624-625) Diane and her husband divorced in 1986. (Tr. 928) Grod and Michael Dreksler use to work together in cultivating marijuana plants inside the Dreksler home. (Tr. 625) Michael Grod remained an acquaintance of Diane Dreksler after the divorce and continued to speak to her. (Tr. 631) In her conversations with Grod, Diane occasionally mentioned her personal use of quaaludes. (Tr. 644-645)

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[2] "Tr." refers to the trial transcripts, "C." refers to the common law record, and "Exhibit" refers to recorded calls from the trial; these are not attached hereto as part of the Appendix.

On January 13, 1992, Michael Grod was arrested by the DEA for growing and possessing over one hundred marijuana plants in his home. (Tr. 571, 601) Grod immediately agreed to become an informant. (Tr. 494, 605, 708) Grod decided the sole focus of his cooperative efforts would be Diane Dreksler. (Tr. 493, 607) As stated by Grod, "I knew I could set her up", because she "talked" about quaaludes. (Tr. 619, 639-640) By Grod's own admission, he immediately began calling Dreksler for quaaludes. (Tr. 599-600) Agent Jodwalis verified that Grod "constantly" spoke with Dreksler. (Tr. 812) By Grod's own admission, he called Diane several times a month. (Tr. 599-600)

Diane's unrebutted testimony at trial established that Dreksler simply ignored his repeated demands to call Ricky Hayes, a quaalude source. (Tr. 936-939) Diane testified that she wished Grod would "stop bothering me about getting quaaludes." (Tr. 937) Indicative of Diane's reticence was her response in early March:

> If I hear anything I'll let you know . . . I just can't be bothered with this right now and I just don't have anything further to say to you.

(Tr. 939)

In mid-March, Grod's campaign became more aggressive. He called more frequently and began harassing Dreksler to call Ricky Hayes. (Tr. 939-940) The fourth week of March Grod became desperate, apparently feeling the pressure of his cooperation becoming less valuable to the DEA:

> My friend Cass and I have put together $500. I don't care what Ricky has or what he can get. Just promise me that when you hang up the phone you'll call Ricky and get $500 of whatever he has and will you promise me then that you'll call back or I'll call you and try and get some quaaludes for me.

(Tr. 940)

On April 6, 1992, approximately three months after he had signed his cooperation agreement, Grod's persistence paid off and he was finally able to alert the DEA to secretly monitor his calls to Diane. (Tr. 499-500, 714) Yet, Diane remained reluctant:

Dreksler: I don't know, you're asking a lot, because I have people coming to work on my kitchen now and to work on my floors and I don't have time to chase.

Grod: Yeah.

Dreksler: Uh.

Grod: I know if he comes out there with the money he's not going to want to leave Highland Park and come back, what's the best thing for you?

Dreksler: I don't have any questions for you right now. I don't know where Ricky is, I don't know where he'll be today, uh, I don't know what to tell you.

Grod: Uh, oh shit.

Dreksler: I would imagine that he'll be home tonight, but I don't know where I'm going tonight either. I know I might be heading out to Carol Stream to see my sister-in-law.

(Exhibit N-1, Call #3, p. 1-2; Tr. 508) Diane relented and later that day arranged for the purchase of twenty-seven quaaludes for Grod's friend "Cass" (Agent Jodwalis). (Tr. 723, 819, 957)

Diane Dreksler was not arrested after the April 6th delivery. (Tr. 618) Rather, Grod set out to recruit her into the Class X offense. On April 7, 1992, Grod engaged Dreksler in another tape recorded telephone conversation regarding a second, larger purchase of quaaludes from Ricky Hayes. (Tr. 523, 750) Grod asked her what larger quantity purchase would have to be made to get a "cut" in price. (Tr.

525-526) On April 8th, in one of three calls made to Diane by Grod, Diane again expressed reticence:

Dreksler: Oh fuck, this is a pain in the ass for me.

Grod: Ya me too.

Dreksler: If it worked out like today by 4 between 4 and 5, it's not an inconvenience for me.

Grod: But then we would only be getting a hundred today, if we picked them up today?

Dreksler: Well maybe that's all you should get for today.

(Exhibit N-1, Call #5, p. 2; Tr. 534-535)

Grod continued to push for the much larger quantity, however. Dreksler relented and arranged for "Cass" (Jodwalis) to buy one thousand (1000) quaaludes from Ricky for $16,500, for which she was only to receive a few quaaludes for her own personal use. (Exhibit N-1, Call #7, p. 1-2)

Jodwalis arrived at Dreksler's house and Diane said that Ricky Hayes had dropped off the quaaludes earlier that day. After Diane showed the quaaludes to Jodwalis, several DEA agents kicked in her door and Diane was arrested. (Tr. 802-803) She told the agents immediately that her source was Ricky Hayes. (Tr. 780)

At no time during their ensnaring of Diane Dreksler did Grod or Jodwalis come into contact with any transporter of drugs, or "mule", employed by Dreksler, did they discover her using any drug code words, nor did they see her wearing a beeper. (Tr. 614-615, 823-824) Nor was any marijuana, other quaaludes, or any drugs or drug paraphernalia found in Dreksler's home. (Tr. 826)

In her defense, Diane called several character witnesses. The trial court ordered the testimony of three character witnesses stricken, and instructed the jury to not consider such testimony in any way. Of the witnesses (two teachers, a photographer, a lawyer and an investment banker) whose

testimony the court did not strike, each testified that Diane had an excellent reputation for being a law abiding citizen. (Tr. 855-856, 880-881, 884, 886-7, 904)

Following the jury's extended seven and one half hours of deliberations, during which the jury sent out several questions indicating confusion over the entrapment defense, the jury returned a verdict of guilty. Following arguments on post-trial motions, the trial court sentenced Diane Dreksler to eight years imprisonment. (C. 313-4)

Dreksler filed her appeal and was granted an appeal bond. She argued several issues on appeal: that the State failed to disprove to beyond a reasonable doubt; that the trial court erred in barring the defense from cross-examining the State's star witness, Michael Grod, about his criminal past; that Dreksler's trial counsel rendered ineffective assistance when he introduced prejudicial evidence regarding her prior use of marijuana; that the trial court erred in precluding the defense from adducing evidence of the circumstances surrounding Diane's post-arrest statements and her agreement to cooperate; that the trial court erred in striking the testimony of several of the defense's character witnesses regarding Diane's excellent reputation for being a law abiding citizen and precluded her character witnesses from testifying that Diane had a good reputation for honesty when her veracity was repeatedly attacked; that the trial court erred in precluding the defense from introducing evidence that Diane had no criminal past; that the trial court erred in responding to jury questions regarding entrapment by reiterating the other crimes instruction and refused to restate the entrapment instruction; that Diane was penalized for exercising her constitutional right to a jury trial when the judge originally indicated he would impose a six-year sentence but sentenced the defendant to eight years after trial; and, that the trial court erred at sen-

tencing when it relied on non-record information and considered an aggravating factor implicit in the offense.

The Appellate Court of Illinois for the Second District affirmed the conviction, but vacated the sentence and remanded for resentencing. Specifically, the appellate court found that: the jury could have found Diane was predisposed to commit the offense, and therefore could have rejected the entrapment defense; the trial court erred in restricting the defendant's cross-examination of the informant and his criminal past, but that such error was harmless; defense counsel did not render ineffective assistance of counsel; the post-arrest statements and conduct of the defendant were properly excluded as irrelevant; the trial court erred in striking the testimony of the defendant's character witnesses regarding her reputation for law abidingness, but that such error was harmless; the testimony of the defendant's character witnesses regarding her reputation for truth and veracity was properly excluded; the defendant waived argument on appeal that the court erred in barring the defendant from introducing evidence of her lack of prior criminal record; the trial court properly and without prejudice reiterated the other crimes instruction in answer to the jury's questions; there was no cumulative error; there was no evidence in the record that the defendant's sentence was increased for exercising her right to trial and her sentence was not excessive; and, that her sentence was indeed based upon improper considerations. *See* Appendix A. Petitioner awaits resentencing.

REASONS FOR GRANTING THE PETITION

I.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S DUE PROCESS RIGHTS WERE CLEARLY VIOLATED WHEN FEDERAL GOVERNMENT AGENTS ENTRAPPED PETITIONER INTO COMMITTING A CLASS X DELIVERY OF QUAALUDES WHEN SHE WAS NOT PREDISPOSED TO DO SO, AND THEN SUBJECTED HER TO A HARSHER STATE COURT PROSECUTION.

The defense of entrapment lies where a government agent, in his zeal to enforce the law, has originated a criminal plan, has implanted in the defendant's mind that plan, and has induced its commission. *See Jacobsen v. United States*, 503 U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). "When the Government's quest for convictions leads to the apprehension of an otherwise law abiding citizen who, if left to [her] own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobsen*. 118 L.Ed.2d at 187.

Illinois statutory and case law is in line with this Honorable Court's rulings identifying the two key issues involved in an entrapment defense as 1) government inducement and 2) a defendant's lack of predisposition. *See Jacobsen*; *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932). The Illinois Criminal Code codifies entrapment as follows:

> A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.

720 ILCS 5/7-12. Predisposition depends upon the defendant's willingness to participate in a crime *before* his or her exposure to government agents. *People v. Poulos*, 196 Ill. App. 3d 653, 661, 554 N.E.2d 448 (1990). Other factors to be considered in assessing predisposition in a drug case include: the defendant's initial reluctance or ready willingness to commit the crime; the defendant's familiarity with drugs and eagerness to accommodate drug user's needs; whether the defendant made a profit from the delivery; the defendant's own use of drugs; whether the defendant tested or cut the drugs; whether the defendant was involved in a course of conduct involving similar offenses; whether the defendant had a prior criminal record; and the defendant's subsequent conduct. *Poulos*, 196 Ill. App. 3d at 661, 554 N.E.2d 448. Whether predisposition existed ultimately depends upon the facts of the case. *Id.*

The Seventh Circuit Court of Appeals recently examined the law of entrapment and its relation to a defendant's predisposition. *See United States v. Hollingsworth*, 9 F.3d 593 (7th Cir. 1993). In analyzing the underlying rationale for the entrapment defense, the court recognized that some government stings are necessary to apprehend and convict criminals who have committed a similar offense in the past or are very likely to commit the crime in the future, and thereby protect society. *Id.* at 598. The court restated that the predisposed individual—the one ready and willing to commit the crime that the government has set up before it has been set up—*is* a threat to society. *Id.* However,

> **"A person who would not commit a crime unless induced to by the government is not a threat to society and the criminal law has no proper concern with [her], however evil [her] thoughts or deficient [her] character."**

* * *

> **". . . [w]illingness, the pure mental state, is not enough; there must also be readiness, in the sense that the defendant was poised, was likely, to engage in criminal activity."**

Id. Following its analysis and application to the facts, the court reversed a conviction outright on the basis of entrapment.

A similar result was necessitated by the facts in Petitioner's case. The facts at trial clearly revealed that Diane Dreksler would not have assisted the government confidential informant in obtaining quaaludes had it not been for the informant's implanting of that scheme in her mind, and his inducement of her to carry out the act. Had Diane Dreksler been left to her own devices, she would not have been committing quaalude delivery offenses, let alone Class X offenses. She had no predisposition to do so; the State did not show that she committed such a crime before or that she was likely to commit such a crime in the future.

Before her exposure to Grod and other government agents, Diane Dreksler had absolutely no inclination to sell quaaludes. The record is barren of evidence that she ever committed any previous drug delivery; both Dreksler's and Grod's testimony established such. Though Diane's language on the taped conversations showed her familiarity with the drug trade, her admitted personal use of quaaludes better explains Diane's knowledge of drug terms. (Tr. 957) This does not make her predisposed to commit quaalude delivery offenses however, especially ones involving a Class X amount.

At trial, the State failed to prove beyond a reasonable doubt that Diane Dreksler had the predisposition to commit a Class X drug offense before her contact with the government agents. Absolutely no evidence supports the notion that Dreksler had previously committed any drug delivery offenses. DEA intelligence did not establish such. Grod did

not so testify, and Dreksler testified that before being asked by Grod, she had never sold any quaaludes, let alone a Class X amount of quaaludes. At best, the evidence showed that Dreksler may have consumed small user amounts of quaaludes and marijuana. But this certainly did not elevate her into a drug dealer, or vest her with the predisposition to commit a Class X offense. Despite this, the government opted to target her, and it took Grod's exploitation of a twenty year friendship and months of unrecorded phone calls to push Dreksler, a school teacher with no criminal record and an excellent reputation, to commit a highly uncharacteristic crime for which she otherwise lacked predisposition. This reeked of entrapment.

Confirming the existence of entrapment, the criminal design in this case originated in the government. The idea to sell a thousand quaalude pills certainly did not originate with Diane Dreksler. She did not approach Grod or Jodwalis, hawking wares. Rather, the plan to get Dreksler to deliver a thousand quaaludes originated with Grod and his DEA handlers. Moreover, manifesting sentencing entrapment, when Grod pressed for a thousand pills, Diane resisted, saying that maybe a hundred is "all you should get for today." (Exhibit N-1, Call #5, p. 2; Tr. 534-535) The government informant, however, refused to accept Diane's reluctance and continued to press for a lager amount—yet another circumstance exhibiting entrapment.

Furthermore, Grod induced Dreksler into committing the offense. Michael Grod cooperated upon his arrest in January, and only had one person in mind to set up: Diane Dreksler. Diane was a "friend" for over twenty years. Acting out of self-interest, Grod knew he could exploit that friendship and set her up. However, it took Grod many unrecorded conversations over several months to even get Dreksler in the position to deliver any quaaludes. Obviously, Dreksler did not ask, nor was she interested, in deliver-

ing quaaludes to Grod when he first contacted her after his arrest. If Dreksler had shown such an inkling, the undercover deal would have occurred much earlier, and Grod would not have waited until April 6th to contact DEA Agent Jodwalis for purposes of finally tape-recording his conversations with Dreksler.

Dreksler's unrebutted testimony about the content of unrecorded telephone conversations between Grod and herself establishes that the State did not disprove entrapment. Commencing in February, Grod began calling Dreksler and asking her to call Ricky for quaaludes. (Tr. 936) Diane did not do so when Grod first called her, and told Grod this when he called back two days later. Undeterred, Grod again directed Diane to call Ricky for quaaludes. Again, Diane did not so. But this did not stop Grod from pressing Diane. (Tr. 937) In mid-February, Diane attempted to defeat Grod's request and told him that she had talked to Ricky, when she did not, so that Grod would "stop bothering" her. (Tr. 937) Grod, however, did not stop bothering Diane and phoned her again in late February asking her to call Ricky for quaaludes. (Tr. 938) Diane, however, did not accede to Grod's request at that time.

The month of March also was filled with telephone calls from Grod to Dreksler, again pressuring Diane to call Ricky for quaaludes. (Tr. 938-40) Finally, at the end of March, Grod demanded that Diane "call Ricky and get whatever he has" as soon as she hung up the phone. (Tr. 940) However, Diane did not agree to deliver quaaludes at that time, and Grod had to repeat his demands in early April.

These unrecorded conversations plainly suggest that Grod, a government informant, entrapped Diane into committing the offense. Significantly, the State did not offer any rebuttal to the defense testimony. The State's failure to rebut these conversations, showing inducement by the gov-

ernment informant, establishes entrapment as a matter of law. *See People v. Poulos*, 196 Ill. App. 3d 653, 661, 554 N.E.2d 448 (1990); *People v. Martin*, 125 Ill. App. 3d 590, 466 N.E.2d 360 (1984).

The undercover tape-recordings made after Grod budged Diane from her initial refusals further exhibit Diane's reluctance to partake. In the first tape-recorded telephone call, Diane told Grod he "asking a lot" and that she did not "know what to tell" him. While Diane made a non-Class X delivery on April 6th, she continued to express reluctance when Grod called her seeking even more quaaludes. On April 8th, Diane informed Grod that "this is a pain in the ass for me," and exposing lack of predisposition to commit a Class X offense, Dreksler suggested that Grod only pick up one hundred (a non-Class X amount), rather than a thousand quaaludes. Persisting in an attempt to get Diane to commit a more severe offense, Grod refused and demanded the larger amount. But even in ensuing conversations after Diane relented, Diane expressed reluctance, saying she "could go away for life," felt "very nervous" and "could not believe we're doing this. . ." Call # 7. Further revealing lack of predisposition to commit a Class X offense, Diane also remarked that she had never seen so much drugs and cash in a transaction in her life.

Additional factors demonstrate that government agents entrapped Diane Dreksler into committing a Class X drug offense. For instance, government agents found none of the trappings of a drug dealer (i.e., beepers, scales, paraphernalia etc.) on or about Diane or in her home. In addition, Diane did not test or cut the drugs in the presence of the agents.

Also, Dreksler did not get involved for significant monetary profit. During the first delivery, Diane handed Jodwalis $5 change. No drug dealer, motivated by monetary

greed, gives $5 change back from $490. And with respect to the second delivery, the tapes show that she was to be given a few quaalude pills.

At bottom, Diane was nothing more than an esteemed 40 year old school teacher and artist who had no prior criminal record and an excellent reputation. While she may have had used marijuana and quaaludes, she certainly did not have a prior inclination to commit Class X drug deliveries before being contacted, pressured and persuaded by the unrelenting government informant. Grod, to escape potential harsh penalties awaiting him in his federal case, induced and persuaded Diane to commit a crime that she obviously would not have otherwise committed if left to her own devices. This amounts to entrapment as a matter of law.

Additionally, Petitioner's due process right were violated when the federal authorities investigating this case and prosecuting Petitioner's confederates in the federal system turned over her case to the harsher state system at the eleventh hour.

The facts surrounding Diane's offense reveal that from the very beginning this was a federal case. The federal investigation relied primarily on the undercover efforts of confidential informant Michael Grod. Grod was arrested and charged federally for possession with intent to distribute one hundred and four (104) marijuana plants found growing in his Hanover Park home.

After Grod was arrested, he agreed to cooperate. He was released on bond, conditioned on his agreement to help make a case against someone else. He signed a cooperative agreement with the federal authorities on January 29, 1992.

The federal authorities, operating under the auspices of the United States Attorney's office, received authorization for the use of consensual eavesdropping devices. Assistant

United States Attorney Ronald May provided the justification, thereby making available the more relaxed federal standards of one-party consensual monitoring. As conceded by the State in pre-trial proceedings, this case involved a "federal undercover investigation."

Diane Dreksler was arrested in her home by Special Agents of the federal Drug Enforcement Agency, with the assistance of the Lake County Metropolitan Enforcement Group. After her arrest, Diane was solicited by the DEA for her assistance and agreed to cooperate. Diane had been advised by the agent that she was in serious trouble, but if she cooperated, the severity of her charges could and would be reduced. Diane told the agents that her source of supply for the quaaludes was Richard Hayes. This, of course, confirmed the federal investigation of Hayes already under way. As the agents testified at trial, their investigative files were labeled "Richard Hayes," not Diane Dreksler.

Diane further advised the agents that Hayes would come to her home to pick up the money she received for his quaaludes. According to all accounts, Diane was nearly hysterical. The agents worked hard at calming Diane so that she might place a call to Hayes. Before that could be done, Hayes himself called Diane, apparently following up on his money. Diane was literally sobbing and in an emotional upheaval at the time of this call. She simply advised Hayes that she could not talk right then. She stated she would call him back later.

Ten (10) minutes did not elapse before Hayes called Diane again. Diane had permitted the agents, secretly, to attach a tape recording devise to her phone, enabling the agents to monitor and record the conversation. During the conversation, because Dreksler was so distraught, the agents passed her notes about how to respond to questions by Hayes. Diane was instructed by DEA Agent Jodwalis to

state that the purported buyer had not given her all the money, that he had pushed her around and that she was emotionally upset. Hayes inquired about whether there were any police present, to which Diane said no.

Diane learned that Hayes could not come to her house to pick up the money because he was babysitting his children. Diane was willing to cooperate with the authorities, but unwilling to deliver the money to Hayes because his kids were at home, as she did not want to see him get arrested in front of his children. Hence, the agents pulled the plug on any further cooperative bargaining, deciding instead to transport Diane to the county jail to be charged with a state felony. In this brief moment, Diane's offense became a state charge.

Thus, though from beginning to end this was a federal investigation, and Grod and Hayes were being dealt with at the federal level, Diane was now in the state system. Diane's being prosecuted by the state may have come about since she did not acquiesce in the final demand given her by the federal agents, or because the federal authorities were concerned with the weakness of their case against her. In pre-trial proceedings the State was adamant in denying any collusion between federal and State authorities seeking to subject Diane Dreksler to the far harsher penalties of the Illinois statutes. However, precisely because this was a "federal undercover investigation", it would appear that Diane Dreksler's prosecution by the State was a direct effort to avoid the more lenient penalties of the federal Sentencing Guidelines. Perhaps there was no collusion seeking to circumvent the Illinois Eavesdropping Statute. But, if federal in nature, why then was it not prosecuted federally? Was it blatant forum shopping calculated solely to punish Diane because she could not bring herself to deliver the money to Hayes and have him arrested in front of his two

(2) children? Because we recognize that there are dual sovereignties with concurrent jurisdiction, perhaps such forum shopping is not actionable. In any event, it's impact must now be seen as nothing less than monumental.

Richard Hayes, also arrested by the federal agents, was charged in federal court. The charges against Hayes involved the identical two (2) transactions of April 6, 1992, and April 8, 1992, for which Diane was charged. Hayes pled guilty to those offenses and admitted to being Diane's source for the very quaaludes which were the subject of Diane's conviction. What was Hayes' punishment?—*eight months in the Salvation Army Work Release Center*, with weekends off. This was not due to a lenient federal judge's mercy, but rather the result of applying uniform federal sentencing law. Similarly, Michael Grod, the lifelong marijuana grower and distributor, *received a federal misdemeanor charge of possession of marijuana for which he was sentenced to 300 hours of community service.*

These disparate results cannot be overstated. Ricky Hayes was Diane's *source*—the person against whom Diane had originally agreed to cooperate, offered evidence and, in fact, secretly tape recorded. Where is the justice in these two (2) widely-disparate results? How does it appear to the public at large that the drug source shall be treated so much more leniently than his "mule?" Hayes, the source of the quaaludes, the leader of the quaalude transactions, the person who was to accept all payment for and profit for the quaaludes, will never see the inside of a prison, state or federal. Additionally, he was not fined. Grod, who has made a living in distributing drugs, has likely already finished his community service and is now free.

In stark and glaring contrast, Diane Dreksler, the first-time offender who the state conceded was receiving no compensation for her involvement, is now facing a sentence of eight years in prison. Though Diane Dreksler is a woman who has never dealt in quaaludes or any other drugs before, and who came into this offense only after months of clever cajoling on the part of a trusted acquaintance, she has already spent five (5) months in prison, *more than the Grod's and Hayes' two sentences combined.* Additionally, through the federal forfeiture proceedings instituted, her car and townhome, for which she had saved over six (6) years and had just purchased shortly before her arrest, were confiscated.

Diane's conduct in this case was not only induced by Michael Grod, but was facilitated by Richard Hayes; a career of drug dealing on one end, and the source for the quaaludes on the other. The outcome that has been reached here, where the uncompensated "mule" in between receives a sentence so grossly exaggerated and disproportionate to those with greater culpability, yields the most unconscionable of unfair results.

II.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S RIGHT TO CONFRONT HER WITNESSES WAS VIOLATED WHEN THE TRIAL COURT DID NOT ALLOW HER TO CROSS-EXAMINE THE STATE'S STAR WITNESS ABOUT HIS OCCUPATION AS A MARIJUANA DEALER.

On January 13, 1992, the DEA arrested Michael Grod for growing approximately 104 marijuana plants in his Hanover Park home. (Tr. 571) The crime carries a five year mandatory minimum sentence in the federal court. *See* 21 U.S.C. § 841(b)(1)(B)(vii). Grod decided to cooperate upon his arrest and Grod signed a cooperation agreement with the DEA on January 29, 1992. (Tr. 579, 601)

Grod was a critical and to some extent the only State witness against Diane Dreksler on the entrapment defense. Grod admitted that he had a number of unrecorded telephone calls with Dreksler between February and April 6th, the date of the first recorded conversation. (Tr. 599-600) No other State witness could testify about the content and tone of these unrecorded telephone calls. Operating as a government agent when he made these calls, Grod plainly had opportunity and motive to induce and entice Dreksler, and Dreksler's unrebutted testimony proves that he did.

Grod was the State's first witness. After asking Grod his age, the prosecutor, taking full advantage of primacy effect, queried: "What is your occupation?" (Tr. 491-92) Grod responded, "I install fences." (Tr. 492) During direct examination, Grod failed to make mention of any other occupation he may have held, including being a marijuana peddler. Thus, the State, through Grod, portrayed its critical and first witness as an ordinary citizen holding legitimate employment.

On cross-examination, the defense sought to question Grod about his employment. The following colloquy occurred:

Q. Mr. Grod, you indicated that your business or occupation is that of a fence installer?

A. Yes.

Q. How long have you been so employed?

A. Off and on since 1970.

Q. Is it not a fact, Mr Grod, that for at least the past 10 to 12 years that your main source of income has been that of a marijuana grower or dealer?

MR. MARGOLIN (Prosecutor): Objection, Judge.

THE COURT: Sustained.

(Tr. 596) A side bar ensued during which defense counsel indicated that he had a good faith basis for the question. (Tr. 597) Defense counsel further argued that the question affected Grod's credibility in that Grod had portrayed himself as "an honest Joe off the street as opposed to one who has for a long time been tied to [illicit] activity." (Tr. 598) In response, the State did not deny that Grod was a long-time marijuana dealer; rather, it argued that the testimony was "irrelevant." (Tr. 597-98)[3] The trial court adhered to its original ruling, stating:

> I think even if he was Manuel Noriega if he was only charged with a Class I possession, I don't think you could go into all the other silliness that he'd had over the years. Because his motive for lying in this case is the federal rap. I don't see any motive for lying if they didn't catch him for the last 30 years and he's been a murderer or whatever the heck he's done. So I am going to limit it to any specific motive that he would have in this case, and certainly there's a clear motive there to go out and get her and to see this case through that the jury can determine whether or not—

(Tr. 598-99)

Later in the cross-examination, defense counsel asked Grod whether he had supplied individuals other than Diane Dreksler with marijuana during the past five years. (Tr. 617) Again, the State objected, and the trial court sustained the objection. (Tr. 617)

By the time Grod stepped off the witness stand, the trial court had completely barred Dreksler from cross-examining him about whether he had an occupation other than being

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[3] The State also suggested that Dreksler could not perfect the impeachment. This, of course, assumed—without basis—that Grod would have denied that he was a marijuana grower for 10 to 12 years.

a "fence installer." Thus, Grod survived cross-examination absent being impugned with an unsavory occupation.

A. The Accused Has A Well-Established Right To Question A Witness About His Unsavory Occupation.

As an evidentiary matter and under the Sixth and Fourteenth Amendments to the United States Constitution and Article I § 8 of the Illinois Constitution, an accused has an undisputed right to confront witnesses. As part of this right, the accused must be allowed to examine a witness about "who he really is"—including queries concerning occupation.

This Honorable Court ensconced this rule over 60 years ago. In *Alford v. United States*, 282 U.S. 686 (1931), defense counsel sought to cross-examine a government witness about his residence. The prosecution objected. Counsel responded that the jury entitled to know "who the witness is, where he lives and what his business is." 282 U.S. at 689. The trial court sustained the objection. On *certiorari*, the Supreme Court reversed the conviction. The Court noted that cross-examination "is a matter of right." *Id* at 691. The Court held that the cross-examiner is entitled to identify the witness in his environment, and may adduce facts discrediting the witness' testimony or showing bias. *Id*. at 691-92. The Court observed:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.
>
> * * *

> The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

282 U.S. at 692, 693.

Alford was reaffirmed in *Smith v. Illinois*, 390 U.S. 129 (1968). There, the State's witness testified on direct examination that his name was "James Jordan." Counsel for the defendant knew otherwise, and attempted to cross-examine the witness about his true name and place of residence. The trial court sustained the prosecutor's objections. Again, the United States Supreme Court reversed for the reasons enunciated in *Alford*.

Similarly, under well-established Illinois law, the accused has an unambiguous right to cross-examine a witness about his or her identity, including occupation. As stated in *People v. Gibson*, 133 Ill. App. 2d 722, 272 N.E.2d 274 (1971):

> It is proper on cross examination of a witness to bring out the witness' unlawful and disreputable occupation and activity as a matter affecting credibility.

Id, 272 N.E.2d at 276. In *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933), the Illinois Supreme Court ruled that it was error to preclude the defendant from ascertaining if a State witness was associated with a house of prostitution. In *People v. Shaw*, 117 Ill. App. 2d 16, 254 N.E.2d 602 (1969), the trial court barred the defense from cross-examining an informant about her current residence and employment on grounds that he had enough acquaintance with the witness and her environment. Following a remand from the United States Supreme Court, the appellate court, on the basis of *Smith* and *Alford*, found reversible error in the trial court's ruling. In *People v. Bond*, 281 Ill. 490, 118 N.E. 14 (1917), the prosecution asked a defense witness whether

she kept a house of ill fame. The Supreme Court found no error in the inquiry, commenting:

> If a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation.

As recognized by the supervising prosecutor during arguments on the motion for new trial in this case, Dreksler should have been permitted to cross-examine Grod about his employment. (Tr. 1067)[4] As a result of Grod's direct examination, the State was permitted to hold its key witness out as having legitimate employment. Defendant was entitled to impeach this testimony. *E.g.*, *People v. Barr*, 51 Ill. 2d 50, 280 N.E.2d 708 (1972) ("The accused has a right to question a witness concerning any matter which goes to explain, modify, or discredit what he said on direct examination."). Moreover, as the above-cited cases hold, Dreksler had a clear right to probe Grod about his illicit employment as a marijuana dealer.

The preclusion of cross-examination compels reversal. "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Alford*, 282 U.S. at 692. Here, Dreksler was deprived the right to have the jury evaluate Grod's claim that he was a mere "fence installer." Grod unfairly was permitted to hold himself out as having legitimate employment, absent the crucible of cross-examination.

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[4] In response to Dreksler's argument that she should granted a new trial because the court precluded cross-examination about Grod's occupation as a marijuana dealer, the prosecutor "admit[ted] that some of the stuff that Mr. Grod may have done in the past would be something that a jury should hear." (Tr. 1067)

Grod's credibility on the issue of "who he really was" went untested. Dreksler was additionally prejudiced since Grod was a critical witness on the entrapment issue. The trial court's preclusion of cross-examination requires reversal for a new trial.

B. By Barring Cross-Examination About Grod's Uncharged History As A Marijuana Dealer, The Trial Court Improperly Curtailed Dreksler's Right To Establish Grod's Bias, Interest and Motive For Testifying.

As part of the right to confrontation, a criminal defendant has the "wide latitude" to examine a witness on the subjects of bias, interest and motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308 (1974); *People v. Wilkerson*, 87 Ill. 2d 151, 429 N.E.2d 526 (1981); *People v. Barr*, 51 Ill. 2d 50, 280 N.E.2d 708 (1972); *People v. Paisley*, 149 Ill. App. 3d 556, 500 N.E.2d 96 (1986); *People v. Adams*, 129 Ill. App. 3d 202, 472 N.E.2d 135 (1984); *People v. Foley*, 109 Ill. App. 3d 1010, 441 N.E.2d 655 (1982); *People v. Pizzi*, 94 Ill. App. 3d 415, 418 N.E.2d 1024 (1981). "The trial court has no discretionary power to deny the defendant the right to cross-examine the witness to show interest, bias or motive." *Phillips*, 95 Ill. App. 3d at 1020, 420 N.E.2d 837. Bias arises when the witness has something to gain or lose by his testimony. *Id.* To cross-examine on bias, interest and motive, the defense need not show that any actual promises of leniency have been made or that expectations of special favor exist in the witness' mind. *Id.*

In this case, Grod's past marijuana dealing past supplied him with a bias in favor of the State, and an interest and motive to testify against Dreksler. Grod's alleged long-time occupation as a marijuana dealer left him vulnerable to prosecutorial authorities and exposed Grod to enhanced penalties in his pending federal case. Indeed, federal sentencing courts can conduct an almost boundless inquiry into a defendant's background in fashioning a sentence. *See* 18

U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Further, under the federal sentencing guidelines governing the determination of Grod's sentence, a prison term is calculated on the basis of "relevant conduct," having the potential to enhance a defendant's sentence significantly on the basis of *uncharged* criminal conduct. U.S.S.G. 1B1.3 (sentence is to be determined on the basis of all relevant conduct and not just the acts comprising the count of the conviction).

Thus, a long-time marijuana dealer caught with 104 marijuana plants faces far more prison time than a simple fence installer nabbed with 104 plants. This, of course, gave Grod a motive to testify falsely and curry favor with prosecutorial authorities. Helping the State and the DEA by testifying against Diane Dreksler could, in actuality and in Grod's mind, minimize the penal liability potentially associated with Grod's marijuana dealing past. The trial court, however, precluded Dreksler from questioning Grod in this regard, thereby curtailing Dreksler's right to showing Grod's bias, interest and motive to testify falsely against her. Given that Grod's marijuana dealing, aside from the 104 plants seized from his home, had impact upon his pending criminal case and affected his bias, interest and motive in testifying and rendered him vulnerable to prosecutorial authorities, Dreksler plainly should have been allowed to cross-examine Grod on the subject.

The error requires reversal for a new trial. As the Supreme Court has said, such limitation on cross-examination constitutes "constitutional error of the first magnitude" for which no amount of showing of want of prejudice can cure. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Moreover, Grod was a key witness for the State. With respect to the

issue of Dreksler's conduct before she was exposed to government agents—critical testimony on the issue of predisposition—Grod was the State's only witness. Reviewing courts in this State have not hesitated to reverse where a trial court improperly limited the testimony of a key prosecution witness, where, as here, the evidence, was close. *See, e.g., People v. Adams*, 129 Ill. App. 3d 202, 208, 472 N.E.2d 135 (1984); *People v. Foley*, 109 Ill. App. 3d 1010, 1016, 441 N.E.2d 655 (1982).

III.

THIS PETITION SHOULD BE GRANTED SINCE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN HER COUNSEL INJECTED ARGUMENT BEFORE THE JURY AND SOLICITED TESTIMONY FROM THE STATE'S KEY WITNESS REGARDING DREKSLER'S PREVIOUS MARIJUANA POSSESSION AND USE.

At trial, in response to the Dreksler's motion *in limine*, the trial court ruled that the State was permitted to introduce evidence of Dreksler's occasional use of quaaludes, but would be barred from eliciting evidence of Dreksler's past possession and use of marijuana. (Tr. 272-277) Incredibly then, without provocation, defense counsel confessed to the jury during his opening statement: "You will hear things about Diane Dreksler. Diane Dreksler had used marijuana in the past." (Tr. 490) Later, in his cross-examination of Michael Grod, defense counsel solicited from Grod that he had supplied Dreksler with marijuana over a period of years. Defense counsel inquired of Grod:

Q: Had you supplied marijuana to Diane?

A: Yes.

Q: For how long?

A: I don't know. Maybe a year, two years. I don't keep track of that.

Q: Two years max?

A: Maybe longer. I just said I don't know.

(Tr. 616-617)

Based on the opening statement and this line of questioning, and at the natural urgings of the prosecution, the court reversed its previous ruling barring evidence of marijuana use and ruled admissible any and all evidence relating to Dreksler's past use of marijuana. (Tr. 621-623) The State was then permitted on redirect of Grod to explore in great detail Dreksler's prior use of marijuana:

Q: Mr. Grod, since first coming in contact, since first meeting the defendant, I think you testified earlier it was 1970, have you observed the defendant smoke marijuana?

THE COURT: You may answer those questions, sir.

A: Yes.

Q: How many times have you observed the defendant smoke marijuana?

A: I don't know.

Q: More than 10?

A: Yes.

Q: More than 20?

A: Yes.

Q: More than 50?

A: Probably.

(Tr. 623)

The *coup de gras* was the State's exhaustive inquiry into the growing of marijuana in Dreksler's home by her ex-husband in the years prior to 1987, the presence of marijuana plants in Dreksler's home for a few months after her husband's departure, and her maintaining of those plants—all these prejudicial allegations seeping into the record absent objection from defense counsel. (Tr. 624-628)

Under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, the admission of Dreksler's other crimes by defense counsel amounted to ineffective assistance of counsel. *Strickland* held the constitutional right to effective assistance of counsel has not been provided if: 1) counsel's representation falls below an objective standard of reasonableness; and 2) counsel's errors are so serious as to deprive the defendant of a fair trial, based upon the reasonable probability that, but for those errors, the result would have been different. This two-prong test was fully adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246, 1255 (1984).

Illinois case law underscores defense counsel's ineffectiveness in the present case. In *People v. Vasquez*, 194 Ill. App. 3d 516, 551 N.E.2d 656 (1990), the trial court granted a motion *in limine* limiting the use of a similar prior offense of the defendant since it would be "highly prejudicial." The State nevertheless went beyond the court's limiting instruction when it presented records of the defendant's conviction to the jury, and defense counsel failed to object and/or remind the court of its previous ruling. *Id.* at 659. Defense counsel's failure to take advantage of the trial court's favorable ruling was deemed unacceptable and prejudicial:

> We can only conclude defense counsel erred in failing to remind the court of its earlier ruling . . . we cannot rule out the reasonable probability defendant was prejudiced by the presentation of such information to the jury to the extent of depriving him of a fair trial.

Id.

Defense counsel's mistakes in the present case go beyond those in the above-cited cases. Not only did counsel for Ms. Dreksler fail to take advantage of the trial court's favorable ruling barring evidence of prior possession and use of marijuana, but he was guilty of a greater sin—*he was the one who introduced evidence of the Defendant buying and smok-*

ing marijuana in the first place. Evidence previously ruled inadmissible was suddenly and unforgivably aired to the jury in all its prejudicial glory, simply because defense counsel ineptly introduced the subject himself.

Dreksler's counsel didn't stop there, however. As in *People v. Park*, ___ Ill. App. 3d ___, 615 N.E.2d 753 (1993), Dreksler's counsel committed a series of errors, the combination of which deprived Dreksler of her federal and state constitutional rights to a fair trial. In *Park*, defense counsel: 1) allowed other crimes into evidence without requesting a limiting instruction; 2) elicited damaging testimony during his cross-examination of state witnesses; and 3) allowed prior consistent statements of the complaining witness into evidence without objection. This Court found that the shift in the weight of the evidence brought on by counsel's combined errors was not merely prejudicial, but "devastating." *Id.* at 760. Analogous to *Park*, counsel in the present case elicited damaging testimony of the defendant using marijuana in his cross-examination of Michael Grod, declined to object to the court's ruling to allow more marijuana evidence in, and idly stood by while the State marched unfettered through the "open door" and delved into the growing and harvesting of cannabis in Dreksler's home several years ago.

All of Dreksler's previous involvement with cannabis was highly prejudicial and irrelevant to whether or not she was entrapped into delivering a thousand quaaludes to a government agent. Yet, her attorney allowed the jury to hear it all. The evidence of her buying small amounts of marijuana, smoking marijuana, her ex-husband's growing marijuana, and her brief maintenance of his marijuana plants was so remote, so unprobative, yet so prejudicial, as to have tainted the verdict. There is no minimizing the effect this evidence had on Diane Dreksler's right to a fair trial. Reversal for a new trial is necessary.

The Sixth Amendment guarantees the right to all defendants that they shall receive effective assistance of counsel. Under the strictures of *Strickland v. Washington*, 466 U.S. 668 (1984), this right has been held to mean that a fair trial is not received by the defendant when his counsel's conduct so undermines the adversarial process that the trial cannot be relied as having produced a just result. Counsel's conduct and decisions throughout Petitioner's trial undermined the adversarial process in that there was virtually no adversary to the government's contentions. The trial was thus unreliable as to whether a just result was in fact reached.

CONCLUSION

WHEREFORE Petitioner Diane Dreksler respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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